COPY

1952

May 5

Senator Suzanne Loizeaux
Sub-Committee of the Legislative Council
Plymouth, New Hampshire

Dear Senator Loizeaux:

In a letter of February 17, 1952, you have requested the views of this office upon the constitutionality of certain proposed legislation which would impose a transfer tax upon tangible personal property purchased at wholesale for resale at retail in this state. The proposal in bill form was enclosed with your letter, and you advise that the matter is being considered by the Legislative Council. You have further advised that our opinion is desired on or before May 12th, 1952.

Upon a careful consideration of the provisions of the proposal, our views are stated as follows: The tax intended by the proposed legislation appears valid when applied to purchases of tangible personal property for resale at retail when such purchases are made within the limits of the state. It is open to serious doubts on constitutional grounds, however, when intended to be imposed on purchases which are consummated outside the boundaries of New Hampshire.

The proposed legislation is entitled "An Act to Impose a Transfer Tax Upon Wholesale Purchases of Tangible Personal Property". Its substantive feature is found in section 2, under the provisions of which a tax would be imposed at the rate of one and four-tenths per cent of the value of all tangible personal property (with certain specific exceptions) purchased at wholesale for resale at retail in this state. The measure of value for the purposes of the law would be the purchase price. The tax would not apply to such purchases when made by non-profit charitable, religious and educational institutions, located and incorporated in this state, nor to purchases made by agencies of the state and federal governments.

The proposed act defines a retailer as "every person engaged in the business of making sales at retail" (s. 1, III). The tax would be paid by retailers (s. 2), would be a personal debt of the retailer to the state (s. 11), and would be due and payable to the Tax Commission at the time of the purchase (s. 10).

COPY

The remaining provisions of the proposal relate to the administration of the law and the collection of the tax; no problem is seen in respect to their validity, and they need not be considered here.

Insofar as the proposed legislation places a tax upon the transfer at wholesale of personal property, such transfer taking place within the limits of the state, it is undoubtedly valid under the Constitution of the State of New Hampshire. Speaking with reference to Art. 6, Part 2nd, of the Constitution, the Court in Opinion of the Justices, 84 N. H. 559, 576, said:

> "Authority is thereby given to lay various kinds of ad valorem taxes upon property, incident upon some characteristic event, which may fairly be considered to reasonably delimit a class of property, so that the selection cannot be rejected as arbitrary, if the event itself affords some rational basis for the imposition of a tax.
>
> "It is immaterial whether such taxes are called excises or something else . . . ."

In the opinion cited, the Court announced that a tax upon sales at retail would be valid in this state. This position it has constantly reaffirmed, Opinion of the Justices, 88 N. H. 500, 503; Opinion of the Justices, 95 N. H. 546, Opinion of the Justices, May 15, 1951, Journal of the House, January Session 1951, page 563. And since such tax is sustained, not in reliance upon some attribute peculiar to sales at retail, but rather upon the "incidence of some characteristic event which may fairly be considered to reasonably delimit a class of property," it seems clear that a tax at wholesale may be upheld upon like grounds.

The class of property delimited consists of tangible personal property purchased at wholesale for resale at retail; the characteristic event is the purchase of the property by the retailer. Neither the selection of the class, nor the choice of the event, can be deemed other than a proper exercise of the power of selection which lies with the Legislature. See, generally, Opinion of the Justices, 84 N. H. 577. The tax, as has been noted, is imposed upon the retailer in his capacity of purchaser; this, however, raises no constitutional bar, since, "it is immaterial whether it is placed upon the seller or upon the purchaser." Opinion of the Justices, 88 N. H. 500, 503.

Nor is a constitutional obstacle seen in the fact that certain classes of tangible personal property are singled out and their purchase at wholesale for resale at retail exempted from the tax. Such exemptions are valid as an exercise of the legislative power of classification of property for the purposes of taxation, Opinion of the Justices, 76 N. H. 609, 611 - 612; Havens v. Attorney General, 91 N. H. 115, based clearly upon "just reasons . . . for the selections made". Opinion of the Justices, 94 N. H. 506, 508; Opinion of the Justices, 95 N. H. 548; Opinion of the Justices, May 15, 1951, supra.

Finally, the exception from the tax in favor of non-profit charitable, religious and educational institutions and in favor of state and federal agencies is likewise not invalid. The accuracy of this conclusion insofar as it relates to governmental authorities is obvious; the exception in respect to non-profit charitable, religious and educational institutions is properly founded upon a well recognized doctrine of law wherein the rendition of service which advances the general welfare is seen to be a basis for classification, and, hence, of exemption. Young Womans Christian Association v. Portsmouth, 89 N. H. 40, 42; Opinion of the Justices, 87 N. H. 490.

It must follow from the foregoing that a transaction wherein a local retailer purchases from a local wholesaler tangible personal property for resale at retail in this state, may be taxed in the manner proposed without objection on constitutional grounds.

Different considerations arise, however, when the purchase by the retailer is consummated outside the boundaries of the state. The effect of the commerce clause (Article 1, section 8, clause 3) of the Constitution of the United States must be considered; cases decided by the Supreme Court of the United States raise grave doubts as to the validity of the proposed tax when attempted to be applied to such transactions.

Reference here is made to such transactions as the following: (a) Purchases by a retailer in New Hampshire who sends an order for goods to a wholesaler in another state, the order being filled f.o.b. at the wholesaler's place of business. According to general principles of law in such case, title to the goods passes when they are placed with a carrier for transportation to the purchaser, R. L. c. 200, s. 19, Rule 4. The sale is consummated at that time and in that place, 46 Am. Jur., Sales, s. 415, and it is then and there that the "acquisition" (s. 1 IV of the proposed legislation) on the part of the retailer takes place. (b) Purchases made by a New Hampshire retailer who travels outside the state to make his wholesale purchases, bringing the goods with him on his return, or shipping them here by public carrier; and purchases made by a retailer who buys his goods at his out-of-state offices or warehouse and carries them to his New Hampshire outlets for retail distribution, in the manner of certain chain organizations.

It has been said of the commerce clause of the federal Constitution: "That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States." McLeod v. Dilworth Co. 322 U. S. 327, 331. It is necessary, then, to examine the manner in which the Supreme Court has applied the constitutional principle thus asserted. And the Dilworth case, just cited, would appear decisive in respect to the hypothetical transaction designated (a) above.

In that case purchases were made from Dilworth Co., a Tennessee corporation as follows: Traveling salesmen of the corporation solicited orders in Arkansas; orders received were transmitted to the Dilworth

COPY

Co. at its offices in Memphis, Tennessee. If approved there, the corporation filled the order and shipped it from its Tennessee warehouse f.o.b. to the purchaser in Arkansas. The latter made payment by mail. The state of Arkansas brought the present action against Dilworth Co. to recover the Arkansas retail sales tax in the manner stated. In holding that such transactions were not taxable by the state of Arkansas the Court stated:

> "We would have to destroy both business and legal notions to deny that under these circumstances the sale - the transfer of ownership - was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction." 322 U. S. at 330.

The philosophy expressed in this case was restated as late as December 1951 in the decision of Norton Co. v. Department of Revenue of the State of Illinois. 340 U. S. 534, While this case treated of the Illinois retailers' occupation tax, a tax not permissible in this state, Opinion of the Justices, 82 N. H. 561, it is important as a late expression of the federal viewpoint concerning the power of a state to tax an interstate transaction.

It may be suggested that since this state could impose a "use tax", Opinion of the Justices, May 15th, 1951 supra, it might properly tax the tangible property purchased at retail outside the state and now held for retail within the state. Such a suggestion was made in the Dilworth case, in reference to which the Court stated:

> "It is suggested, however, that Arkansas could have levied a tax of the same amount on the use of these goods in Arkansas by the Arkansas buyers, and that such a use tax would not exceed the limits upon state power derived from the United States Constitution. Whatever might be the fate of such a tax were it before us, the not too short answer is that Arkansas has chosen not to impose such a use tax . . ." (emphasis added).

And so in the case of the present proposal when attempted to be applied to goods now in the state and held for resale at retail here but purchased elsewhere, the "not too short answer" is that the tax under consideration is not a use tax.

In connection with transactions such as those suggested in (b) above, it is believed that the foregoing principles also effectively prevent the imposition of the proposed tax upon them. And, in addition, a more obvious objection is found in the fact that in such case both the buyer (retailer) and the seller (wholesaler), as well as the goods themselves, are outside the state when the taxable event occurs. Even apart from the commerce clause of the United States Constitution an attempt to tax the property at the event under such circumstances would seem a wholly unsupportable attempt to project the taxing power of the state beyond its boundaries.

Very truly yours,

Warren E. Waters
Assistant Attorney General